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IN THE

Supreme Court of the United States

October Term, 1964
No. 543

NICHOLAS DEB. KATZENBACH, as Acting Attorney General of the United States, *et al.*,

Appellants,

—v.—

OLLIE MCCLUNG, SR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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ARGUMENT

Introduction

Proponents and opponents alike agree that the Civil Rights Act of 1964 is one of the most significant legislative enactments in our history. Both Houses of Congress subjected it to lengthy and exhaustive hearings, debate, and controversy, and finally passed it by large majorities. Much of the lengthy consideration and debate focused on the part of the Act involved in this case, Title II providing for "Injunctive Relief Against Discrimination in Places of Public Accommodation." We think it appropriate to say of this law, as Chief Justice Marshall said of the bill incorporating the bank of the United States, that it:

> . . . did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, . . . in the fair and open field of debate . . . with as much persevering talents as any measure has ever experienced, and being supported by arguments which convinced minds as pure and intelligent as this country can boast, it became a law. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.[1]

Yet, appellees, with extraordinary intrepidity, have summoned arguments rejected by Congress and have persuaded a Court of the United States that the public accommodations law is an exercise of "naked power" by the Congress unsanctioned by the Constitution.

The importance of such a case is manifest. The desirability of promptly determining this issue has been recognized. We submit below that Congressional power to enact this law under the power to "regulate Commerce . . . among the several States" can be sustained by settled and conventional constitutional doctrine reflected in decisions as old as *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, and as recent as *N. L. R. B.* v. *Reliance Fuel Corp.*, 371 U. S. 234. Indeed, in light of the precedents, the commerce issue cannot be regarded as difficult or close.

We shall also discuss a more subtle danger lurking behind appellees' frontal, and perhaps premature,[2] attack on the

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[1] *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 401.

[2] We recognize that the issues of justiciability and equity jurisdiction raised by the United States involve substantial questions which may well necessitate reversal of the judgment below independent of the constitutional and statutory issues. Because of time

Civil Rights Act. This danger is that the force and effectiveness of the Act may be weakened, even temporarily, by a restrictive construction.[3] Compare the "Sugar Trust Case," *United States* v. *E. C. Knight Co.*, 156 U. S. 1, with *Swift & Co.* v. *United States*, 196 U. S. 375. Even an inadvertent or implied restriction on the coverage of the Act could cripple it immeasurably, by undermining the pattern of voluntary compliance which has emerged in many localities as well as by its effect on enforcement proceedings in lower courts. This danger is acute here because neither the United States nor any person aggrieved by discrimination has made an effort to present facts establishing that appellees' restaurant is covered by the Civil Rights Act.[4] The only evidence of coverage was presented by the appellees themselves, and they naturally had no interest in developing any facts pertaining to coverage which would undercut their constitutional theories. Despite this, it does

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limitations this brief is limited to a discussion of the paramount issues of constitutionality and interpretation.

There is a substantial public interest in prompt resolution of the issues of constitutionality, and since the Act is clearly valid under settled principles, there is no compelling reason for postponing decision. Cf. *Turner* v. *Memphis*, 369 U. S. 350. Further guidance to the lower courts on questions of interpretation of the Act—again where the congressional purpose is manifest—is also plainly desirable and appropriate notwithstanding the procedural difficulties in this case. Rules of self-restraint applicable to decisions of constitutional issues do not apply with equal force to statutory interpretation, because Congress can rectify any error of interpretation.

[3] Already some judges have construed the Act so restrictively as to remove most restaurants from coverage. See the special concurring opinion of Circuit Judge Bell with Judge Hooper in *Willis* v. *Pickrick*, —— F. Supp. —— (N. D. Ga., No. 9028; September 4, 1964); earlier proceedings reported at 231 F. Supp. 396.

[4] Consistent with its view that there was no equity jurisdiction and no justiciable controversy, the United States made no investigation of this restaurant, and presented no witnesses or exhibits.

plainly appear from the record that "Ollie's Barbecue" is a "place of public accommodation" as defined in Section 201 of the Act. The case properly presents an occasion for application and interpretation of the Act.

I.

Appellees' Restaurant Is a Place of Public Accommodation Within the Meaning of Section 201 of the Civil Rights Act of 1964 Reasonably Construed With Appropriate Regard for the Purposes and Constitutional Power of Congress.

All parties agree, and the evidence is conclusive, that Ollie's Barbecue is a "restaurant . . . principally engaged in selling food for consumption on the premises," and is one of the types of facilities mentioned in Section 201(b)(2) of the Act. Equally undisputed, this restaurant "serves the public" (§201(b)). No one contends that the restaurant is excepted from the Act as a "bona fide private club or other establishment not open to the public" (§201(e)). There is clear proof that appellees deny to Negroes (including customers, potential customers and employees) "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" of the establishment by discrimination and segregation on the ground of race and color.[5]

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[5] Both appellees testified to their policy of refusing Negroes food service except at a take-out counter for Negroes (Tr. 34, 60, et seq.). They mentioned several occasions when Negroes had been denied table or counter service on racial grounds (Tr. 43, 60). Ollie McClung, Sr. acknowledged that Negro employees were segregated from white employees when eating on the premises (Tr. 57). (The reference in §201(a) to "all persons" is surely broad enough to cover employees as well as customers.)

A restaurant is a place of public accommodation covered by the Act "if its operations affect commerce, or if discrimination or segregation by it is supported by State action" (§201(b)). In Section 201(c)(2) the Act provides that the operations of a restaurant "affect commerce within the meaning of this title" if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce." Section 201(d) provides criteria for determining whether discrimination or segregation by an establishment is "supported by State action within the meaning of this title."

Appellees argued below that their restaurant *was* covered, but only by virtue of §201(c)(2) relating to the movement in commerce of food served. The District Court agreed, stating that the issues "require our consideration of only that portion of the statute relating to restaurants which serve food, 'a substantial portion' of which 'has moved in commerce.'" The court held that provision unconstitutional. Also, the Court undertook to cast doubt upon the validity of the alternative criterion in §201(c)(2) providing coverage of a restaurant if "it serves or offers to serve interstate travelers," by observing:

> No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir. 1959); Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959); United States v. Yellow Cab Co., 332 U. S. 218 (1947).

Whatever the limitations of its opinion, the order of the District Court enjoined the Attorney General from enforcing Title II, *as a whole*, against appellees. It is submitted below that Ollie's Barbecue is a place of public accommodation within the Act in that it "offers to serve interstate travelers." Next, it will be demonstrated that appellees failed to establish that they did not actually "serve . . . interstate travelers" and that the most logical inference from the record is that they do and are covered by this criterion as well. Further, it will be urged that the evidence concerning this restaurant establishes that "a substantial portion of the food which it serves . . . has moved in commerce." Finally, it will be submitted that insofar as there was no substantial evidence from which absence of state support for segregation as defined by subsection 201(d) can be ascertained, there was no occasion for a ruling on the validity or applicability of this subsection, and no justification for the broad injunction.

A. *Ollie's Barbecue Offers to Serve Interstate Travelers Within the Meaning of §201(c)(2).*

The evidence relevant to the "offer to serve" criterion may be summarized briefly. The trial court found that:

> 5. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad and bus station and between six and eight miles from the nearest airport.
>
> 6. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

Ollie McClung, Sr. testified that his restaurant, which has ample parking facilities (Tr. 35), is located on a state

highway which intersects an interstate highway eleven blocks away (Tr. 32);[6] and that he makes no effort to attract "transients" (Tr. 36).

The restaurant is of course open to the public (including Negroes if they will submit to the indignity of segregated "take-out" service), and there is no evidence that the general offer to serve the public expressed by the existence of an open restaurant has been in any way qualified to exclude an offer to serve interstate travelers, either passing through the City, or at the beginning or end of a journey, or in the City on a brief or prolonged stopover during an interstate trip.

On this state of the record, the question is whether §201 (c)(2), construed in the light of constitutional limitations, must be read as embodying a requirement that the offer to serve be—in some sense—"substantial."

Appellants submit that nothing in the purpose of the Act, its legislative history, or the Constitution requires that the statute be construed as if it had read "*substantially* offers to serve."

Numerous considerations oppose any such reading. First, an initial version of the bill contained a substantiality requirement as to actual service, but Congress amended that version and passed the bill in its present form.[7] Dele-

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[6] The sworn complaint also mentioned a truck route one block from the restaurant but asserted that no trade was derived from this route (Complaint, ¶3).

[7] The Bill, as originally introduced in the House by Congressman Celler as H. R. 7152, did contain such a limiting requirement in Sec. 202(a)(3):

> . . . (i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers . . .

tion of this requirement carries with it not only the plain implication that Congress intended no requirement that there be a substantial amount of actual service of interstate travelers, but implicates, as well, that there was no intent that offers be "substantial." If it were otherwise the independent "offer to serve" criterion would make no sense as it would refer to a highly unlikely category of restaurants; those that make a substantial offer (or effort) to serve interstate travelers but actually serve few or none.

Second, the criterion relating to movement of foods in commerce is immediately contiguous to the "offers to serve" clause and does have an explicit substantiality requirement. Congress knew how to say "substantial" when it meant to do so.

Third, Congress did desire to cover virtually all restaurants, just as it quite clearly wished to cover all hotels, motels, etc., by §§201(b)(1) and 201(c)(1), and almost all motion picture houses, etc. by §§201(b)(3) and 201(c)(3). The court below correctly assumed that the purpose of Congress was "to put an end to racial discrimination in all restaurants," save only an eccentric (and probably theretofore nonexistent) class of public restaurants refusing to admit interstate travelers and serving no substantial portion of food which has moved in commerce. The evidence is persuasive that the purpose of Congress was to enact for the nation a public accommodations law broadly comparable in coverage of restaurants (and hotels, theatres, etc., as

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Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963)

This section of the Act was changed to its present broader form after passing through the full House Judiciary Committee. *Minority Report*, H. R. Rep. No. 914, 88th Cong., 1st Sess. 79 (1963).

well to the public accommodations laws of 30 states and the District of Columbia.[8]

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[8] In presenting the Bill, Congressman Celler said:

"All we do here is to apply what those 30 States are now doing and what the District of Columbia is now doing to the rest of the States so that there shall be no discrimination in places of public accommodation privately owned. . . ." 110 Cong. Rec. 1456 (Daily Ed., Jan. 31, 1964).

The issue was sharply focused when Mr. Willis sought to amend Section 201(c) to "strike out the following, 'it serves or offers to serve interstate travelers or' and insert in lieu thereof the following: 'a substantial number of the patrons it serves are interstate travelers and.'" 110 Cong. Rec. 1901 (Daily Ed., Feb. 5, 1964).

Congressman Celler opposed the amendment:

"This amendment would change that. Instead of being in the disjunctive, it would be in the conjunctive, and the Attorney General would have to prove two things. First, he would have to prove that in a particular restaurant the service is to a substantial number of interstate travelers. Not merely to interstate travelers but to a 'substantial' number of interstate travelers. And, in addition, he would have to prove that a substantial portion of the food which is served has moved in interstate commerce. That is a proof that is twofold, and it makes it all the more difficult for the Attorney General to establish that proof. It cuts, as it were, the import of the words 'affect commerce,' which are on page 43, line 24, in half. You have this situation, for example. Whereas, in the proposal before us, many restaurants are within the orbit of the prohibition of the bill, many of such restaurants would not be covered under this amendment. Take, for example, a roadside restaurant which sells home-grown food which does not come from outside the State. That would not be covered under the amendment. Furthermore, a local restaurant which serves local people with food coming from all over the United States would not be covered under the amendment. Let me repeat that.

"We have very significant results here. *Instead of having all restaurants covered*, under this amendment you would eliminate the restaurant, for example, a roadside restaurant that sells home-grown food. You would also eliminate the local restaurant that serves local people with food that comes from all over the country. I do not think we want such a situation to develop, and for that reason I believe that the whole pur-

Fourth, an implied "substantiality" standard would make it so difficult for citizens and restaurateurs to know their rights as to completely cripple its administration. Of course, Title II contains no criminal penalties; its applicability to numerous categories of restaurants could be hammered out on a case-by-case basis in the courts. To a certain degree that is inevitable with any law. But with this law there is a clear recognition by Congress that its real effectiveness would in some measure depend upon the fact that the people of our land are law abiding and will obey the law when it is clear and unequivocal. The establishment of the Community Relations Service (Title X of the Act) to resolve disputes concerning the law without litigation (cf. §§204(d), 205), demonstrates the importance which Congress attached to obtaining voluntary compliance and avoiding many thousands of lawsuits against individual establishments.

The uncertainties that would befall the law if a substantiality test is read into the "offers to serve" criterion may be illustrated by a few questions and examples. Does the criterion cover "offers to serve" which are inexplicit as to interstate travelers, but are, because of the circumstances in which they are made, highly likely to come to the attention of such travelers? Can location be considered so that a restaurant would be covered merely by being open to the public in the immediate neighborhood of an interstate route or terminal absent any actual off-the-premises effort to attract such travelers? Would Ollie's Barbecue be in a different position if the state highway it now adjoins is made a part of the interstate highway system? Would

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pose of covering restaurants would be defeated by this amendment." (*Id.* at 1902.) (Emphasis supplied.)

The amendment was rejected at p. 1903. It should be noted that this amendment would have entirely deleted the "offer to serve" criterion.

Ollie's be covered if: (a) located two blocks from a terminal? (b) listed in a national credit card directory? (c) it advertised in a local paper with substantial interstate circulation? (d) located in a metropolitan area straddling a state line—Texarkana, for example?

We have no doubt of the capacity of the courts to resolve these and manifold similar questions which a substantiality requirement would entail. We do doubt and deny that the Congress really intended to require a Negro citizen seeking restaurant service to make these calculations before he can know his rights.[9] This should not be required, any more than Bruce Boynton was required to know the intercorporate relations between interstate carriers and the operator of a terminal restaurant in order to be protected by the Motor Carriers' Act. *Boynton* v. *Virginia*, 364 U. S. 454. The Civil Rights Act is also available as a defense against criminal charges (§203). The Eighty-eighth Congress never envisioned that it was assuring the Negro first class citizenship in restaurants only along interstate highway routes and in the more or less immediate environs of air, bus, rail or sea terminals, and only there after an almost inevitable lawsuit.

It is submitted that the "offer to serve" criterion, should be given its proper broad scope and construed to cover all restaurants save those which by some means explicitly and in good faith negative the implied invitation to serve

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[9] Senator Magnuson, presenting an analysis of Title II, said:

"Most public eating places would be within the ambit of title II because of their connection with interstate travelers or interstate commerce. And in some areas, public eating places would come within the ambit of title II, because of the factor of State action.

"At any rate, it is clear that few, if any, proprietors of restaurants and the like would have any doubt whether they must comply with the requirements of title II." 110 Cong. Rec. 7177 (Daily Ed., Apr. 9, 1964).

the general public, among whom, by definition, are interstate travelers.

B. *There Is No Proof That Ollie's Barbecue Does Not Actually "Serve . . . Interstate Travelers"; the Record Tends to Show the Contrary.*

The criterion of actual service of interstate travelers is plainly designed to complement the "offers to serve" criterion. As noted above, a substantiality requirement was deleted from the Bill in the House Judiciary Committee, and an attempt to reintroduce it was defeated on the House floor.[10] As the appellees sought and obtained an injunction against the entire Title II they had the burden of establishing that they did not fall within this criterion as well. The Court found that "*to their knowledge* plaintiffs serve no interstate travelers" (emphasis supplied). The finding exactly conformed to the interrogation of Ollie McClung, Sr. on direct (Tr. 36):

> Q. In your judgment, have you attracted any transient people or travelers? A. Not to my knowledge, Sir.

But there was no evidence that McClung had made any effort to find out whether occasional interstate travelers consumed some of the over half-million meals he serves annually. McClung claimed many regular customers and to know many "by face" (Tr. 35). Though he made quite a point of enumerating nonracial reasons why he sometimes refused service to customers (persons who had been drinking or used profanity; Tr. 48), there was no mention of a policy of refusing to serve interstate travelers. Quite plainly there was no evidence because there was no such policy. The verified complaint sworn by Ollie McClung, Sr. alleges (¶3):

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[10] See Notes 7 and 8, *supra*.

> Plaintiffs do no advertising and make no effort to attract transient customers. *Their* trade has been received and retained by virtue of the excellent quality of the food and service and the wholesomeness of the surroundings (emphasis supplied).

The referent of the word "their" in the last quoted sentence seems to be "transient customers" but the passage is not unambiguous. At the least, there was no assertion or finding that no interstate travelers were served. If such a claim had been proved, the injunction should fall for lack of standing insofar as it applies to both of the statutory criteria dealing with interstate travelers. Actually it seems probable, viewing the record on balance, that some indeterminate and perhaps small number of interstate travelers are among McClung's customers.

Neither the text of the Act nor its legislative history supports the notion that the Act is limited to restaurants serving a substantial number (or proportion) of interstate travelers. The considerations detailed above in discussion of the "offers to serve" criterion apply equally to the actual service criterion:

(a) A version containing a substantiality requirement was amended in committee, and an attempt to insert such a rule was defeated on the House floor.

(b) A substantiality rule is explicit in the criterion relating to movement of food in commerce.

(c) Congress did wish to cover almost all restaurants and to discourage easy evasion by the three criteria which undoubtedly overlap for most establishments.

(d) A substantiality rule would render the Act inadministrable, leaving persons who desire its protection in doubt as to their rights with respect to any particular place, and

thus encouraging experimentation with disobedience pending a court ruling in every case.

C. *A Substantial Portion of the Food Served by Ollie's Barbecue Has Moved in Commerce Within the Meaning of Section 201(c)(2).*

The trial court concluded "as a matter of law, on the basis of objective evidence, that a 'substantial' portion of the food served by plaintiffs has moved in commerce within the meaning of the act." The evidence amply supported this conclusion which can be sustained without gauging the ultimate reach of "substantial" in this clause. This is no borderline case.

Fifty-five percent (55%) of appellees' food purchases in dollar volume during a recent year was meat (Tr. 39), the principal commodity sold and a house specialty. Between 80 and 90 percent of this meat was purchased in Birmingham from one supplier, George A. Hormel & Co., all of whose meat came from outside Alabama. There was no evidence to show the origin of other products sold.

Thus, a substantial "portion" of the food actually served at Ollie's had come from other states. (There is no reason to believe that Congress meant the substantiality criterion to refer to an external standard, as the words plainly refer to a substantial portion of the food served by a particular establishment. But if there is an external standard, the $69,783.00 spent annually by the McClungs to buy out-of-state meat is a large and significant amount. Compare this amount, for example, with the $10,000 "amount in controversy" requirement for jurisdiction of the District Courts over federal question and diversity cases, 28 U. S. C., §§1331, 1332.)

There is no basis for a contention that Congress meant to limit coverage to restaurants which purchased directly

from out-of-state wholesale suppliers. The phrase "has moved in commerce" plainly contemplates coverage of businesses such as appellees' which purchase from local wholesalers who, in turn, are supplied with goods from other states.

Finally, the definition of "commerce" in §201(d) is conventional, drawing on the many cases defining commerce for constitutional purposes. The definition quite clearly covers the shipment of foods from state to state for eventual retail sale.

D. *As There Was No Evidence Upon Which It Might Be Decided Whether Discrimination at Appellees' Business Was Supported by State Action Within the Meaning of §201(d), the Appellees Had No Standing to Obtain, and the Trial Court No Equity Jurisdiction to Grant, an Injunction Embracing This Provision.*

No party to the case has contended that the discrimination at Ollie's Barbecue is "supported by state action" as that familiar *constitutional* phrase is given a possibly more limited *statutory* meaning in §201(d).

No evidence negated the possibility that the discrimination here was "carried on under color of" a regulation encouraging segregation like that involved in *Robinson* v. *Florida*, 378 U. S. 153, which would seem to be embraced by §201(d)(1), for example. Neither was there any record pertaining to state or local enforcement of the custom of segregation within §201(d)(2). Cf. *Lombard* v. *Louisiana*, 373 U. S. 267. As far as this *amicus* is advised, the Birmingham segregation ordinance involved in *Gober* v. *Birmingham*, 373 U. S. 374, was repealed after that decision, but again appellees made no effort to make a record.

It hardly need be said that Congress would have power under the fifth section of the Fourteenth Amendment to proscribe segregation practices of the types condemned in the

Robinson, Lombard and *Gober* cases by appropriate means. If such state support existed the Act could constitutionally be applied. *Civil Rights Cases*, 109 U. S. 3, 25. If it did not exist (and the McClungs, as proponents of the idea carried the burden to show that it did not), then the McClungs made no showing of standing to obtain an injunction against enforcement of this part of the law. Cf. *Bailey* v. *Patterson*, 368 U. S. 346.

The trial court opinion states that counsel for the United States "conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises." We do not know the exact nature of the purported concession at the unreported oral argument. It may have been merely that the government had no evidence of state involvement to present and did not rely on the state action criterion in arguing about appellees' proof. In any event, a concession of counsel is a plainly insubstantial basis upon which to enjoin enforcement of portions of an Act of Congress directly predicated upon recent decisions of this Court. Certainly, the government did not consent to such an injunction.

E. *The Suggested Interpretation Indicated in This Brief Would Enable the Various Parts of the Law to Function in a Complementary Manner to Effectuate the Congressional Purpose.*

It may readily be observed that possible constructions of the various subsections and clauses more restrictive than those urged above will present serious problems in harmonizing the various parts. For example, as noted, an interpretation that only "substantial," "significant" or "vigorous" "offers to serve" were encompassed would leave that clause a meaningless duplication of the actual service criterion.

It is hard to imagine that Congress wrote a special clause for the rare restaurant which made a vigorous effort but did not succeed in getting any interstate travelers. Conversely, if a substantial number of interstate travelers were served, why would Congress bother to provide separately for those which made "offers to serve"? That would be in contemplation of a null class of restaurants serving substantial numbers of interstate travelers, without offering to serve them—either actively or by implication.

This *amicus* suggests that the purposes of Congress in enacting the three criteria were to cover virtually all restaurants, to close loopholes and prevent easy evasion, and to conform the statutory criteria for demonstrating an effect on commerce to approved judicial reasoning on the constitutional issue of effect on commerce, in support of its underlying judgment that racial discrimination in the restaurant business affected commerce and should be regulated.

It is common knowledge that most restaurants would probably be covered by all three criteria. Congress obviously was aware of the pattern of evasion that might follow a law relying on only one of the criteria. The "white intra-state" waiting room gambit (cf. *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1861), and *Georgia* v. *United States*, 201 F. Supp. 813 (N. D. Ga. 1961), aff'd 371 U. S. 9), might have been merely the prototype of a new chain of "white intra-state only" restaurant signs if Congress had let the matter rest with the "offers to serve" criterion. But few restaurants could be expected to police such a rule. Thus the actual service criterion discourages any such attempted evasion. The criterion involving movement of food in commerce, while not so easy of evasion, does have a "substantiality" test and consequently may frequently involve considerable difficulty, time and expense in proof. In almost

any case, such proof might necessitate discovery to obtain information concerning suppliers and purchasing patterns, followed by an elaborate trial with numerous wholesalers called as witnesses to prove the origin of the food; restaurateurs will commonly have no personal knowledge of the origin of their foods and will very seldom know of such things as seasonal variations in the movement of various types of foods about the country. And, of course, a Negro traveler or resident standing in front of a restaurant with his family wondering if the law required his admission would find such a state of the law hopelessly confusing and little better than the old order.

It would do incalculable harm if all the efforts to narrow the Act which failed in Congress were to be engrafted on it by construction.

The relation of the statutory criteria to the constitutional reasoning supporting this exercise of the Congressional power to "regulate Commerce . . . among the several States" will appear below. Also, of course, all the arguments that demonstrate the reasonableness of the proposed constructions tie in with the constitutional questions concerning what Congress might reasonably be empowered to do. But it should be noted that Congress deleted from the bill a broad criterion for coverage which would have required that a litigant prove that an offending restaurant's operations *affected* travel or the movement of goods.[11]

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[11] See Section 202(a)(iii) of H. R. 7152 (discussed in n. 7 above) providing for coverage if:

> "(iii) the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, . . ." (*Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963).)

The deletion of this provision and insertion of the present criteria was an expansive thrust by Congress and a recognition that administration of the Act would be made difficult by the requirement of having to make such a record.

II.

The Power of Congress to Regulate Commerce Among the States Supports Title II of the Civil Rights Act.

First, a few general principles. In 1824 Chief Justice Marshall wrote that commerce was "a general term, applicable to many objects," that it "undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, 189-190. The vast power granted was recognized:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution (22 U. S. (9 Wheat.) 1, 196).

And Chief Justice Marshall, the champion of judicial review, added:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments (22 U. S. (9 Wheat.) 1, 197).

The rules governing exercise of the commerce power stated in *Gibbons* v. *Ogden*, *supra*, are still vital today. Con-

gress is barred from regulation only of "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." (Ibid. at 194; emphasis supplied.) That commerce which does "affect other states" is within the regulatory power of Congress.

Before proceeding to the particulars of this case, and the reasoning supporting this particular regulation we discuss two matters argued by appellees which apparently furnish some of the basis for the opinion below. First, Title II has been criticized because Congress inserted no findings in the Act that regulating intrastate activities was necessary. Second, the Act is criticized because Congress provided restaurateurs no administrative or judicial forum to litigate whether racial discrimination in their facility affected commerce among the states.

To the former objection one may say, as this Court did in *United States* v. *Carolene Products*, 304 U. S. 144, that the Act carries a presumption of constitutionality, and a presumption that Congress has acted rationally whether or not it sets out "findings":

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators (304 U. S. at 152).

As to the second objection, the congressional power to decide when regulating commerce is appropriate has been

clear since *Gibbons* v. *Ogden, supra.* Congress has sometimes provided for judicial and administrative determinations of the effect of particular practices on commerce, but it has also on numerous occasions made the legislative determination that a particular practice affecting commerce must be regulated or prohibited. Mr. Justice Stone wrote in *United States* v. *Darby,* 312 U. S. 100, 120:

> But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.
>
> In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act [Fair Labor Standards Act], the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger,* 250 U. S. 199 . . .; *Virginian R. Co.* v. *System Federation, R. E. D.,* 300 U. S. 515, 533. . . .

Darby brings us to the central issue at hand. Can it fairly be said, as the Court below held, that Congress could not rationally have believed, considering the information available, that racial discrimination in virtually all types of public restaurants (save only those rare and insulated places which serve only local food to local people) affects commerce.

We submit but a few of the lines of reasoning which may support such a regulation. Congress surely can regulate in light of the aggregate effect of numerous enterprises, large and small, engaged in a particular practice. *Wickard* v. *Filburn*, 317 U. S. 11, should settle that. It would be an incredible disablement of the Congress to overturn *Wickard* and limit congressional power to regulate components of an industry to where it can be demonstrated as to each component, to the satisfaction of the courts, that the individual practitioner of a prohibited practice has the apprehended adverse effect on commerce.

This would be just as true of the non-communist affidavit provision of the Taft-Hartley Act (*American Communications Assn.* v. *Douds*, 339 U. S. 382) or the prohibition against counterfeit bills of lading upheld in *United States* v. *Ferger*, 250 U. S. 199, as it was of the unfair labor practices condemned in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601, 606, where the Court held immaterial "the smallness of the volume of commerce affected in any particular case." See *N. L. R. B.* v. *Reliance Fuel Corp.*, 371 U. S. 224.

The Act can be sustained by reference to the congressional power to regulate matters affecting interstate travelers. The movement of persons is "commerce." *Edwards* v. *California*, 314 U. S. 160; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. Congressional power is not dependent on a finding that local practices have completely *blocked* interstate travel, or that the practices have affected

the *volume* of travel. Congress can regulate to promote the safety, ease, pleasure and convenience of interstate travel, to assure that travel is not embarrassed or disturbed, to promote travelers' "freedom of choice in selecting accommodations." Cf. *Morgan* v. *Virginia*, 328 U. S. 373, 381, 383.

Surely if the Congress can compel the humane treatment of cattle, sheep and swine by requiring carriers to unload them for rest, water and feeding for five consecutive hours every twenty-eight hours (Live Stock Transportation Act of 1906; 34 Stat. 607; 45 U. S. C. §§71-74), it can promote the convenience of human travelers. Cf. *Boynton* v. *Virginia*, 364 U. S. 454. There is no constitutional ground for limiting the congressional power to prohibit racial discrimination to restaurants located within terminals, for other accommodations also affect travelers. Interstate travelers using common carriers commonly wander from the main routes of commerce during stops for business or pleasure reasons. Vacationing motorists do the same. Congress is empowered to promote the convenience of travel of Negro citizens by assuring that public accommodations generally are open to them.

The statutory criteria dealing with the movement of foods are also directly related to the constitutional power. The power of Congress to prohibit the shipment of goods in commerce is well established (*Champion* v. *Ames*, 188 U. S. 321), and this is true without regard to the "innocent" character of the goods involved. *United States* v. *Darby*, 312 U. S. 100, 116-117, overruling *Hammer* v. *Dagenhart*, 247 U. S. 251. Congress could prohibit the shipment of food in commerce for sale in restaurants that practice racial discrimination, or the acquisition of goods from the channels of commerce for such purpose. It did prohibit the shipment of goods manufactured under substandard labor conditions (*United States* v. *Darby*, *supra*). The fact that

the one case involves "shipment in" and the other "shipment out" does not diminish the congressional power. Cf. *McDermott* v. *Wisconsin*, 228 U. S. 115; *United States* v. *Sullivan*, 332 U. S. 689. The effect of such a drafting of the public accommodations law would be to deny to discriminating restaurateurs access to the great national market in foodstuffs in aid of a practice which Congress wants to halt. Yet the actual law, drafted so as to be much more manageable administratively, and so as to fasten the regulation directly upon the discriminator serving food which has moved in commerce, accomplishes exactly the same thing. There is no interest to be served by requiring Congress to use an awkward method rather than a direct method for controlling an evil it has power to prohibit.

And, of course, it is no valid objection to a regulation or prohibition of commerce that Congress is partly, or even primarily concerned with fostering the public good or morality. *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Darby*, *supra*, at 116; *United States* v. *Rock Royal Co-Operative*, 307 U. S. 533, 569.

Numerous other arguments support the regulation involved. Among those which have been argued by the United States are the power of Congress to cope with the injury to commerce caused by racial strife, including boycotts and similar demonstrations (cf. *N. L. R. B.* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1); the power of Congress to eliminate the artificial restrictions on the market for goods imposed by discrimination practices; the power to promote the volume of travel; and the power to reduce other economic dislocations resulting from discrimination in places of accommodation. All of these factors were indeed considered by the Congress which had much evidence on these matters before it, as the United States has demonstrated at length

in its brief in this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, October Term 1964.

Finally, it should be reemphasized that the volume of commerce affected in the particular case is not determinative of the congressional power (*N. L. R. B.* v. *Fainblatt*, 306 U. S. 601), nor is the partially "local" character of the particular operation, *United States* v. *Women's Sportswear Mfg. Assn.*, 336 U. S. 460, 464 ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"). In *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, the Court was "not impressed" by an argument that the Sherman Act "could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective" (347 U. S. at 189). In that case, as in this one, the products had come to rest never again to move in commerce, yet Congress had power to regulate. The application of the Federal Food, Drug, and Cosmetics Act of 1938 to a retailer selling drugs purchased from a wholesaler nine months after completion of interstate shipment demonstrates the scope of power to deal with local retail transactions. *United States* v. *Sullivan*, 332 U. S. 689.

III.

Title II Does Not Offend Any Other Constitutional Provisions.

The District Court concluded its opinion by holding that Title II violated appellees' rights under the due process clause of the Fifth Amendment. The Court summarily rejected the appellees' elaborate argument that the law violated the Thirteenth Amendment. The extent of the District Court's reliance upon the Tenth Amendment, which was quoted in the opinion, is unclear. We shall discuss these provisions in turn.

A. *A Requirement That Restaurateurs Open to the Public Provide Service Without Racial Discrimination Does Not Violate the Fifth Amendment Due Process Clause.*

If the District Court's Fifth Amendment holding is taken to mean only that the Congress was without power to enact the law under the commerce clause, the preceding argument is sufficient answer to it. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43-47; *United States* v. *Darby*, 312 U. S. 100, 125-126.

But perhaps the argument contends that notwithstanding the commerce power, the right to racially discriminate in a public restaurant, is a liberty or property right so basic and fundamental that it may not be regulated by government at all. This argument would, of course, apply equally to invalidate all state public accommodations laws under the due process clause of the Fourteenth Amendment.

The argument is totally unsupported by precedent. The validity under the due process clause of state law requiring equal treatment in public accommodations has always

been assumed. Cf. *Civil Rights Cases*, 109 U. S. 3, 17-18, where the Court compared racial discrimination by businesses open to the public with other "private wrongs" and the discriminating businesses were said to be "answerable therefor to the laws of the State where the wrongful acts are committed." Even more directly applicable is this statement in *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100, 109:

> And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.

And see *Railway Mail Assoc.* v. *Corsi*, 326 U. S. 88, directly rejecting a due process objection to a state law prohibiting discrimination in employment. Cf. *Colorado Anti-Discrimination Com.* v. *Continental Air Lines*, 372 U. S. 714; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 34.

Actually, the result urged by appellees would be inconsistent with a host of decisions of this Court; to name but a few: *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Boynton* v. *Virginia*, 364 U. S. 454; *Peterson* v. *Greenville*, 373 U. S. 244; *Henderson* v. *United States*, 339 U. S. 816; and *Mitchell* v. *United States*, 313 U. S. 80.

B. *The Thirteenth Amendment Is No Bar to the Act.*

The McClungs' elaborate Thirteenth Amendment argument below is difficult to regard as serious; the District Court saw nothing in it. It should be remembered that this argument too would invalidate every state public accom-

modations law. Actually, if taken seriously, it would prevent almost all economic regulation. It is perhaps sufficient to note that the argument never comes to grip with the obvious choice open to any proprietor unwilling to obey a public accommodations law—but not open to slaves—that is, to quit and do something else for a living.

This Thirteenth Amendment claim has an especial irony, in that the McClungs purport to assert the rights of their employees, most of whom are Negroes. This Court has rejected attempts like this one to pervert the meaning of the Thirteenth Amendment from the time of its first construction of the Amendment. *Slaughterhouse Cases*, 83 U. S. (18 Wall.) 36, 67-72. Cf. *Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 199; *Arver* v. *United States* (Selective Draft Law Cases), 245 U. S. 366, 390.

C. *The Tenth Amendment Does Not Invalidate Title II.*

The plenary power of Congress over commerce has been plain from the beginning. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, 197; *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 407, 421; *Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419. The Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U. S. 100, 124. The Amendment does not limit the power of Congress to regulate commerce by means appropriate to the permitted end. No matter what "doubts may have arisen of the soundness of that conclusion" during a brief period in the Court's history, they have been "put at rest." (*Id.*)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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